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IN THE

Supreme Court of the United States

October Term, 1966

No. 576

PETER JOSEPH TROIANO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO OPPOSING BRIEF FOR THE UNITED STATES

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Petitioner has read the Brief for the United States in opposition to his petition for a writ of certiorari. It requires and merits a reply.

At the outset, the Court of Appeals and the Solicitor General each erroneously alluded to the seized car as containing "a million dollars in counterfeit stamps" (See Government's Brief in Opposition, p. 3; Cf. Opinion of Court below, p. "A2" of Petitioner's Appendix to main petition for certiorari). The portion of the discernible tapes involved co-indictee Costello telling the agents that the car contained one million four-cent stamps worth twenty thousand dollars. The search of the auto disclosed

four cartons of stamps in the trunk of the car without space for another carton.

Secondly, a novel question to be decided by this Court appears to present itself from the Government's own assertion in their Opposing Brief, that the first search and seizure of the vehicle, after which time the agents drove to the Customs House, tested the stamps, replaced the stamps and returned the seized auto with its contraband to the hotel area, waited for a driver to appear, was all purportedly legal since the vehicle had become the property of the United States by forthwith forfeiture.

Petitioner has never conceded that the agents could have lawfully seized the car. Petitioner's objection was sustained by the Trial Court in this record (R. 30a).* Petitioner's oral argument before the Trial Court contended that there was no probable cause to immediately arrest him upon entering the car after the agents had confiscated the stamps and car and made the auto and stamps Government property. The dual search and seizure here was illegal. Chaos in the guide lines prescribed in *Mapp* v. *Ohio,* 367 U.S. 643; *Preston* v. *United States,* 376 U.S. 364; *Wong Sun* v. *United States,* 371 U.S. 471; *Draper* v. *United States,* 358 U.S. 307; *Carroll* v. *United States,* 267 U.S. 132 will inevitably result if the Government's position is upheld.

E.g., if the Government would be permitted to search and seize a car without warrant and probable cause, then to have the Government replace the seized contraband and return "the property of the United States" to the area and await a driver whom the agents admit they never saw before, is unreasonable and illegal and its proceeds and arrest should be condemned as inadmissible and illegal.

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* The "R" references are to the Appendix for Appellant in the Court of Appeals, Third Circuit.

The search without a warrant will be sustained where it is made incidental to a lawful arrest and contemporaneous therewith as to time and place. Both conditions must be present. *Preston* v. *United States,* 376 U.S. 364, *supra, Carroll* v. *United States,* 267 U.S. 132, *supra.* The search must be truly incidental to the primary purpose for the arrest and may not be used as an excuse to search for evidence to justify the arrest, *United States* v. *DiRe,* 332 U.S. 581. If truly incidental to a lawful arrest, the search may extend to objects under immediate control of the suspect. *Preston, supra,* 376 U.S. at 367, 84 S. Ct. 881; *Carroll, supra,* 267 U.S. at 158. In keeping with the foregoing principles, it seems clear that the dual searches and seizures of the auto and stamps was not truly "incidental" as to time and place. The fact that the auto and contents was not searched and seized until about eleven P.M. on October 9th, 1961 (R. 7, 12 and 23) at the Customs House, far from the petitioner's place of arrest, and in the further view that the evidence was returned to the hotel area with its replaced contraband the early morning of the following day, October 10, 1961, and considering that petitioner was not arrested until about 3:30 A.M. (R. 6, 9, 15, 23 and 29) when he approached said vehicle, the second search and seizure occurring within at least four hours after the first search and seizure, and far away from the Customs House laboratory, should justify the conclusion that both conditions were not present here as prescribed in *Preston, supra,* and *Carroll, supra.*

The agents testified they were informed by special employee Blaney many hours prior to petitioner's arrival by car in Philadelphia that Costello and Noce were bringing postage stamps via auto to Blaney and the purported buyer. The Government had sufficient opportunity to secure a search warrant, and even the alleged exigencies

of the situation does not excuse this failure. It must be borne in mind that when the agents returned the auto to the hotel area it was sandwiched in "bumper to bumper" in front and behind with two of the agent's cars. This Court reversed a conviction based on the evidence seized at the time of the arrest, and held that a search without a warrant was not justified unless there were "exceptional circumstances" and the exigencies of the situation make that course imperative. *McDonald* v. *United States,* 335 U.S. 451.

Agent Jordan testified that the car in question was locked in "*bumper to bumper* in front and behind to make sure that *it couldn't be moved*" (R. 13, 24). This is not an exigent situation. The agent agreed it would have been "*impossible*" for petitioner *to move* the car (R. 23-24). (Emphasis supplied.) Moreover, the Government now contends in their Opposing Brief that when petitioner entered the auto he was entering the Government's property which had been forfeited to them. Once the car and stamps were deemed by the Government to be their property they had no right to release the contraband in a public area to await a trespasser on their property and to charge petitioner with a crime.

The agents knew that the auto was not petitioner's property. Special Employee Blaney and Government's witness Costello informed the agents it was Costello's car and stamps. The Government contends the car and contents became their property after the initial search. In any event, it wasn't petitioner's property. Costello and Noce made a deal with the Government to testify against petitioner in return for their severance and probation terms notwithstanding their culpability and petitioner's innocence. The Government shifted the prosecution from Costello and

Noce (uncle and nephew) to petitioner. This obviated the necessity of the Government calling Blaney as their witness.

Turning to the denial of a continuance, since the earliest day of this great country, it has been a simple principle founded on fundamental justice and fairness not to hurry a criminal proceeding so as to do injustice to a defendant. As the Court stated in *Rex* v. *Rapp*, Pa., 1 Dall. 9, 1 L. Ed. 7 (Pa. 1764):

> "In all cases whether criminal or civil, a trial shall not be hurried on, so as to do injustice to the defendant. Rex v. D'Eon, 3 Burr. 1513."

The granting of a continuance is a matter within the discretion of the Trial Judge, whether the requests are made before trial, *Nilva* v. *United States*, 352 U.S. 385, 395; or during its course, *Avery* v. *Alabama*, 308 U.S. 444. It was shown that the Trial Judge acted arbitrarily and substantially impaired petitioner's ability to defend himself. This Court should recognize, that "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar* v. *Sarafite*, 376 U.S. 575, 589. See also *Avery* v. *Alabama*, *supra* (counsel appointed less than three days before trial). Whether there was an abuse of discretion "must be found in the circumstances present in every case, particulary in the reasons presented to the Trial Judge at the time the request [was] denied." *Ungar* v. *Sarafite*, *supra*, at 589.

The Government concedes that the Trial Court stated (R. 108):

> "The Court: • • • I will *adjourn this trial* and permit you to have the tape transcribed and I will

adjourn the trial until 10 o'clock on the 24th of June." (Emphasis added.)

However, when petitioner renewed the application for the adjournment of the non-jury trial to June 24th, the Court later reversed its original position and denied the motion (R. 159-161). The Trial Court's exercise of discretion can only be tested in the light of the reasons disclosed at the time the motion was *first* entertained and granted. *Ungar* v. *Sarafite, supra,* at 589. The Trial Court's reversal of its original ruling deprived petitioner of the opportunity to exculpate himself by using the adjournment to transcribe the tapes and to subject the agents and Costello to rigorous cross-examination which would have shown not only was petitioner blameless but that the real culprits were Noce and Costello. It would have seriously weakened the Government's proof and petitioner's defense was thereby prejudiced. True, Noce did not participate in the recorded conversations but his relative, Costello, did and they reported to each other regarding the stamp-sale negotiations. The first time the agents laid eyes on petitioner was when they returned the auto and stamps to the street near the hotel and waited for someone to approach the car. Petitioner walked in the direction of the car to await Noce and Costello and as a result stands convicted and sentenced for the Government's illegally acquired and inadmissible evidence.

CONCLUSION

For all of the reasons set forth in the main petition for a writ of certiorari and for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: October 26, 1966.

Respectfully submitted,

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Petitioner pro se